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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1316~~ ~~1317~~ 109

JOHN HENRY DOKES and SYLVIA DOKES,

Petitioners,

—v.—

STATE OF ARKANSAS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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In the

Supreme Court of the United States

October Term, 1966

No. .....

John Henry Dokes and Sylvia Dokes,

Petitioners,

—v.—

State of Arkansas.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above-entitled case on December 19, 1966, rehearing of which was denied January 30, 1967.

Citation to Decision Below

The decision of the Supreme Court of Arkansas (R. 95-99) is reported at —— Ark. ——, 409 S.W.2d 827, and is set forth in the appendix *infra,* p. 1a.

Jurisdiction

The judgment of the Supreme Court of Arkansas affirming petitioners' convictions was entered on December 19, 1966 (R. 95-99). An order denying petition for rehearing was entered by the Supreme Court of Arkansas January 30, 1967 (R. 104).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioners having asserted below, and

asserting here, deprivation of rights secured by the Constitution of the United States.

Questions Presented

1. Whether the state met its burden of proving that a husband and wife consented to the nighttime search of their home, the scene of a peaceful and orderly interracial social gathering, and intentionally and knowingly waived their Fourth Amendment and Fourteenth Amendment rights.

2. Whether petitioners' convictions upon a charge of contributing to delinquency denied them due process of law as guaranteed by the Fourteenth Amendment where the record fails to disclose any evidence that they caused, encouraged or contributed to delinquency within the meaning of the rule of *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

3. Whether petitioners may be convicted consistently with the due process clause of the Fourteenth Amendment of violating a vague and indefinite contributory delinquency statute which is susceptible to unpredictable application against innocent and unpopular persons.

Constitutional and Statutory Provisions Involved

1. This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the following statutes of the State of Arkansas:

(a) Ark. Stats. Ann., §45-239 (1964 Replacement)

Any person who shall, by any act, cause, encourage or contribute to the dependency or delinquency of

a child, as these terms with reference to children are defined by this act, or who shall, for any cause, be responsible therefor, shall be guilty of a misdemeanor and may be tried by any court in this State having jurisdiction to try and determine misdemeanors and upon conviction therefor, shall be fined in a sum not to exceed five hundred dollars [$500.00], or imprisonment in the county jail for a period not exceeding one [1] year, or by both such fine and imprisonment. When the charge against any person under this act concerns the dependency of a child or children, the offense, for convenience, may be termed contributory dependency, and when it concerns the delinquency of a child or children, for convenience it may be termed contributory delinquency. Provided, however, that the court may suspend any sentence, stay or postpone the enforcement of execution or release from custody any person found guilty in any case under this act when, in the judgment of the court such suspension or postponement may be for the welfare of any dependent, neglected or delinquent child as these terms are defined by this act, such suspension or postponement to be entirely under the control of the court as to conditions and limitations.

(b) Ark. Stats. Ann., §45-204 (1964 Replacement)

The words "delinquent child" shall mean any child, whether married or single, who, while under the age of eighteen [18] years, violates a law of this State; or is incorrigible or knowingly associates with thieves, vicious or immoral persons; or without just cause and without the consent of its parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime; or knowingly frequently visits a house of ill-repute; or know-

ingly frequently visits any policy shop or place where any gaming device is operated; or patronizes, visits or frequents any saloon or dram shop where intoxicating liquors are sold; or patronizes or visits any public pool room where the game of pool or billiards is being carried on for pay or hire; or who wanders about the streets in the nighttime without being on any lawful business or lawful occupation; or habitually wanders about any railroad yards or tracks or jumps or attempts to jump on any moving train, or enters any car or engine without lawful authority, or writes or uses vile, obscene, vulgar, profane or indecent language or smokes cigarettes about any public place or about any schoolhouse, or is guilty of indecent, immoral or lascivious conduct; any child committing any of these acts shall be deemed a delinquent child. . . .

(c) Ark Stats. Ann., §48-903.1 (1964 Replacement)

It shall be unlawful for any person under the age of twenty-one [21] years to possess or purchase any intoxicating liquor, wine or beer. It shall also be unlawful for any adult to purchase on behalf of a person under the age of twenty-one [21] any intoxicating liquor, wine or beer. Any person violating this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00).

Statement

On Saturday evening, January 30, 1965, at about 11 P.M., Officer Jim Harris (an off-duty Little Rock policeman who worked as a night watchman for the Little Rock Housing Authority) observed several automobiles carrying white

occupants enter the Booker Home Project (R. 24-25). He considered this "very unusual" (R. 25) because only Negroes lived in the Booker Home Project (R. 31, 39-40). He did not consider it a violation of the law, but felt he should investigate (R. 32) even though he would not have made "as thorough an investigation" had only Negroes been in the cars (R. 35-36). No complaint of any disturbance had been made (R. 34-35). Officer Harris called the Vice Squad and two other officers came to the housing project (R. 27).

Petitioners are married and live in a two bedroom apartment in the Booker Home Project (R. 61). At the time of his arrest, petitioner John Henry Dokes, a Negro, age 23, was employed at a local department store, along with James Charton and Paul Schmolke, both white. Charton and Schmolke asked Dokes if they could listen to a Negro singing group (which he was forming) rehearse at his apartment (R. 58-59). In addition to the singing group, Dokes expected only Charton and Schmolke on January 30, but he admitted others whom they had in turn invited (R. 59). A total of twenty Negroes and whites, including the other members of the singing group, and Claude Taylor, a young man under contract to a recording company (R. 87) came to the apartment (R. 64). Of these, there were seven adults and five persons under eighteen years of age (R. 15-16). James Charton, an adult, brought some beer and another adult brought a small bottle of rum to the apartment (R. 60). Mrs. Sylvia Dokes, a Negro, age 22, made herself a drink with the rum (R. 70) but it is uncontradicted that neither she (R. 70) nor her husband (R. 63) gave any beer or liquor to any of the minors (R. 82). During the course of the evening, Dokes requested that his wife get a record player (R. 63, 68). She and Steve Charton and Kenny Gill (R. 71) two white males, left the apartment and encountered Officers Harris, Terry and Parsley outside (R. 31).

Officer Terry testified that at about 11:30 P.M. "we stopped them and took them back to the apartment" (R. 40) and that after he had identified himself as a police officer outside the apartment Mrs. Dokes raised no objection to his entering (R. 41). Officer Harris stated "it is possible" that he said "we are police officers, where is the party . . . Take me to the party" (R. 31). He also testified "She made no objection to us coming in when we identified ourselves as police officers" (R. 27).

Petitioner Sylvia Dokes testified that one of the officers asked where the party was and told her to "Take us back where you came from" (R. 71). She denied that she invited the officers into her home (R. 71-72).

Inside the apartment, which the officers entered without a warrant, no one was loud or rowdy or using obscene language (R. 33, 35). The guests were spread throughout the three rooms (R. 85). None of the officers saw beer or whiskey in the hands of any person under eighteen years of age, nor did they see petitioners give any beer or whiskey to anyone (R. 37, 46, 48, 56). There were beer cans in the apartment (R. 28) and a 19-year-old girl was holding Sylvia Dokes' drink when the officers entered the apartment with her (R. 42, 46). In questioning a person under eighteen years of age, one officer detected the odor of alcohol on her breath (R. 53). The officers then arrested all 22 persons in the apartment; the minors were charged with possessing alcoholic beverages and the adults, including petitioners, with contributing to the delinquency of minors pursuant to Ark. Stats. Ann §§45-239, 204 (R. 43, 44).

Petitioners plead not guilty to oral charges, were tried in the Municipal Court of Little Rock, found guilty and fined $25.00 plus $10.50 costs each. A *de novo* trial before the Circuit Court of Pulaski County, Arkansas on April 8,

1966 resulted in a jury verdict of guilty and an increase in the fines to $200.00 each. The circuit judge directed a verdict of acquittal for their two codefendants on the ground that "it wasn't their apartment" (R. 56, 80). At the trial petitioners' counsel was denied the opportunity to examine jurors concerning a handbill circulated prior to trial by The Capital Citizens Council describing an "interracial rum and beer party" and listing the name, address, age, sex and race of those arrested in petitioners' apartment (R. 13, 15, 16).

On appeal, the Supreme Court of Arkansas affirmed the convictions on December 11, 1966 and denied petition for rehearing January 30, 1967.

How the Federal Questions Were Raised and Decided Below

Petitioners filed a motion to dismiss the charge of contributory delinquency in the Circuit Court of Pulaski County, Arkansas (R. 18-19) alleging that they were arrested "solely because they permitted a peaceable interracial gathering in their home," and that they were thereby denied their federal constitutional rights to peaceably assemble, due process of law, equal protection of the laws, and to be free from unreasonable search and seizure, in violation of the Fourteenth Amendment to the Constitution. Petitioners also moved to suppress any evidence obtained from their apartment on January 30, 1965 on the ground, *inter alia*, that such evidence was obtained in violation of their rights under the Fourth and Fourteenth Amendments to the Constitution (R. 20).

The trial judge overruled both motions prior to trial and again at a hearing held May 23, 1966, subsequent to trial and conviction (R. 20-A, 23-24). During the course of

the trial, the court permitted the arresting officers to testify as to what they saw inside petitioners' apartment before they arrested petitioners.[1]

Petitioners' motion for new trial (R. 12-16) raised, among other questions, denial of their Fourteenth Amendment rights by unreasonable search, seizure, and arrest and challenged the verdict as contrary to law. The motion was denied (R. 17).

Petitioners appealed to the Supreme Court of Arkansas, arguing in their brief that the convictions violated the Fourteenth Amendment in that:

(1) There is no evidence in the record to support the convictions.

(2) The statute under which the state proceeded is vague and uncertain.

(3) The admission of testimony regarding observations by police officers inside a home entered without warrant or probable cause violates the Constitution.

(4) Convictions for contributing to the delinquency of a minor violate the Constitution because no delinquent minor was ever identified.

(5) The convictions are based upon an information and charge to the jury rendered inapplicable by statutory amendment prior to their trial.

(6) The arrest and conviction was motivated by racial considerations.

The Supreme Court held that there was "no merit in appellants' contention that there was an unlawful search,"

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[1] The court refused, however, to permit the introduction of certain physical evidence seized in petitioners' apartment, without explanation (R. 51).

for the reason that the constitutional immunity from unreasonable search could be waived and in its view of the record, petitioner Sylvia Dokes "waived the right to a search warrant" (R. 97).

The Court also considered petitioners' constitutional claim that "the State failed to prove the necessary facts to sustain the conviction for contributory delinquency" (R. 97). It concerned itself first with the proper construction and scope of the statute challenged as vague, adopting the holding of an earlier decision "that a person may be found guilty of contributing to the delinquency of a minor, under our statute, by acts which directly tend to cause delinquency, whether that condition actually results or not" (R. 98). The Court then looked to the record to determine whether there was any evidence (expressly disclaiming any intention to weigh its sufficiency (R. 97)) to support the convictions and held they were "well supported by the evidence" because "it is only necessary for the State to prove a condition or circumstances existing that would tend to cause, encourage or contribute to the delinquency of a child" (R. 98).

The Court failed to pass on appellants' remaining "points for reversal" on the ground that they "were not brought into the motion for a new trial and cannot be considered for the first time on appeal" (R. 98).

Petition for rehearing, reasserting petitioners' federal constitutional claims, was denied (R. 100-04).

Reasons For Granting The Writ

I.

Arkansas Has Not Met Its Heavy Burden of Showing a Waiver of Fourth-Fourteenth Amendment Rights and That the Waiver Doctrine Was Properly Applied to Excuse the Warrantless and Unreasonable Nighttime Search of Petitioners' Apartment.

This is a case of shocking police misconduct which this Court should reverse because the official mischief shown falls so clearly within the scope of the Fourth Amendment. Acting solely because whites and Negroes of both sexes peacefully entered an all-Negro public housing project, officers of the Little Rock Vice Squad thrust themselves into a quiet and orderly social gathering without even a suspicion of unlawful conduct. Absent the presence of whites and Negroes at this gathering and, perhaps, its taking place in a low income public housing project, it is apparent that the police would not have invaded petitioners' privacy much less disturbed it to the extent of arresting petitioners and their visitors on evidence which does not rise to the dignity of a criminal violation, see *infra* pp. 19-23, cf. *Lankford* v. *Gelston*, 364 F.2d 197, 204 (4th Cir. 1966) (Sobeloff, J.).

The only testimony introduced by the State to prove petitioners were guilty of contributing to delinquency was that of the police officers as to what they observed after they entered petitioners' apartment. Convictions based on such testimony deny petitioners the protection of the Fourth and Fourteenth Amendments if the policemen's observations were made only after an unconstitutional entry of their home as clearly as if the officers had seized every object within their vision and such tangible evidence had been introduced at petitioners' trial. *Cf. Johnson* v. *United*

States, 333 U.S. 10 (1948); see also *Wong Sun* v. *United States*, 371 U.S. 471, 485-86 (1963). In this case the police officers had neither a search (R. 35) nor an arrest warrant (R. 55). There was no reason to suspect that any crime had been committed (R. 35) let alone probable cause to make an arrest, prior to their entrance into the apartment. Warrantless search has occasionally been found reasonable where "the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant," *Stoner* v. *California*, 376 U.S. 483, 486 (1964) but none of these exceptions are remotely applicable here.[2] While arrests were made after the officers had entered petitioners' apartment, the arrests even if lawful clearly do not avail to justify the prior warrantless entry.[3] *John-*

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[2] No moving vehicle was the subject of search. *Carroll* v. *United States*, 367 U.S. 132, 159 (1925) approves searches of moving vehicles upon probable cause "for belief that the contents of the automobile offend against the law." No question of feared destruction of contraband is involved or other emergency circumstances. *Johnson* v. *United States*, 333 U.S. 10, 15 (1948) (dictum), suggests that searches may be justified by the necessity of an emergency, such as the threatened destruction of evidence. Nor was this a search incident to a lawful arrest, *United States* v. *Rabinowitz*, 339 U.S. 56 (1950).

[3] In *Johnson*, a Seattle police detective, accompanied by federal narcotics agents, smelled burning opium and knocked at the door of a hotel room from which the odor emanated. At the same time, the men announced themselves as police officers. The door was opened, the only occupant in the room was placed under arrest, and a search was made which turned up incriminating opium and smoking apparatus which was still warm, apparently from recent use. The district court refused to suppress the evidence, the defendant was convicted and the conviction affirmed by the Circuit Court of Appeals. This Court reversed (333 U.S. at 15-17):

> The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without a warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty.
>
> The Government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her

son v. *United States*, 333 U.S. 10 (1948). "It goes without saying that in determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe *at the time of their entry.*" *Ker* v. *California*, 374 U.S. 23 at 40 n. 11 (1963) (emphasis in original). The officers had no warrant of arrest nor probable cause to believe a crime had been committed; under no circumstances could their entry be viewed as incident to efforts to make a lawful arrest.

The Arkansas Supreme Court did not deal with the reasonableness of the search but affirmed petitioners' convictions on the ground that no matter how unreasonable, the search did not violate petitioners' constitutional rights because Mrs. Dokes gave her consent to the officers' entry. This record, however, does not show waiver of Fourth Amendment rights by Mrs. Dokes; much less that the state met its burden of proving knowing and intentional waiver of a constitutional right under the standards of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

This Court looks to the facts to determine if a constitutional waiver actually took place, *Brookhart* v. *Janis*, 384

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room and found her to be the sole occupant . . . Thus the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made their arrest.

Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects," and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.

U.S. 1, 4 (1966) and the facts here show that the police barged in without a thought to petitioners' Fourth Amendment right to privacy. Sylvia Dokes testified that one of the officers told her to "Take us back where you came from" (R. 71) and that she did not invite the officers to her apartment (R. 71-72). Officer Terry corroborated Mrs. Dokes' version because he acted as if Mrs. Dokes was in his custody. He stated that "we stopped them and took them back to the apartment" (R. 40) and that Mrs. Dokes raised no objection to his entering only after he had identified himself as a police officer outside the apartment (R. 41). Officer Harris said it was "possible" that he stated "We are police officers where is the party? . . . Take me to the party" to Mrs. Dokes (R. 31). He also testified that after identifying themselves as police officers they were "invited" into the apartment but later clarified what he meant by "invited":

> "Q. And she then invited you in, or at least made no objection to your coming in? A. She made no objection to us coming in when we identified ourselves as police officers" (R. 27).

More than forty years ago the Court refused to accept this kind of "implied coercion" as waiver of Fourth Amendment rights, *Amos* v. *United States*, 255 U.S. 313, 317 (1924).

This evidence does not meet the state's burden of showing a voluntary and understanding waiver of constitutional rights. Viewed in the light most favorable to the state it shows only ignorant acquiescence in unlawful police conduct because it is clear that petitioner Sylvia Dokes was not told that the officers needed a warrant to conduct a search or that the officers had no ground for lawful entry absent waiver. While this Court has never

had occasion to confront the question squarely, *Johnson* v. *United States,* 333 U.S. 10, 13 (1948) plainly takes the view that in order to be effective, a consent to search or seizure must be intentional relinquishment or abandonment of a known right or privilege. Cf. *United States* v. *Blalock,* 255 F. Supp. 268 (E.D. Pa. 1966). This is the concept of waiver ordinarily applicable to fundamental guarantees and it has not been suggested the Fourth-Fourteenth Amendment rights are exceptions to the rule. See *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938); *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948); *Fay* v. *Noia,* 372 U.S. 391, 439 (1963); *Brookhart* v. *Janis,* 384 U.S. 1, 5 (1966). It is not enough that the individual acquiesces in a method of procedure against which the Constitution gives protection; he or she must know of the protection which the Constitution gives and intentionally abandon or relinquish it. *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

Waiver of constitutional rights should not be found except on a record in which the state spells out fully and convincingly the circumstances claimed to amount to the waiver. See *Swenson* v. *Bosler,* 35 U.S.L. Week 3320 (March 13, 1967); *Westbrook* v. *Arizona,* 384 U.S. 150 (1966); *Carnley* v. *Cochran,* 369 U.S. 506, 513-517 (1962). Petitioners submit that the only evidence of consent appearing in this record, the inconsistent, incomplete, and conclusory testimony of the arresting officers, fails to meet the state's heavy burden of proof, *Johnson* v. *Zerbst,* 304 U.S. 458 (1938) that a constitutional right has been waived.

II.

The Standards Under Which a State Meets its Burden of Showing a Waiver of Fourth-Fourteenth Amendment Rights is a Question of Public Importance Which Merits the Exercise of This Court's Certiorari Jurisdiction.

A number of considerations make the question of waiver raised a matter for the Court's utmost concern.

First, as searches and seizures validated by consent may proceed without a warrant or probable cause, or even a showing of reasonableness, a finding of consent totally precludes the operation of the Fourth Amendment. For this reason the courts have long experienced systematic abuse of the consent doctrine by unscrupulous police officers. See e.g. *United States* v. *Arrington,* 215 F.2d 630, 637 (7th Cir. 1954); *Lankford* v. *Schmidt,* 240 F. Supp. 550, 557, 558 (D. Md. 1965) rev'd on other grounds, *sub. nom. Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966) (series of 300 armed searches sought to be justified by consent). The vigor of the Amendment depends on the adoption of careful standards governing determination of voluntary consent, *Ker* v. *California,* 374 U.S. 23, 33 (1963).

Secondly, the court has not decided a case involving the voluntariness of consent to search and seizure in twenty years and the few prior decisions do not address the questions arising in case after case today.[4] The Court's

[4] *Gouled* v. *United States,* 255 U.S. 298 (1921), where consent was procured by misrepresentation, and *Johnson* v. *United States,* 333 U.S. 10 (1948), where entry "was granted in submission to authority," *id.* at 13, have been viewed as extreme cases. *United States* v. *Mitchell,* 322 U.S. 65 (1944), considers only the effect of the *McNabb* rule on consent to search. *McDonald* v. *United States,* 335 U.S. 451 (1948), does not distinctly address the question of voluntariness of consent. But see *Amos* v. *United States,* 255 U.S. 313, 317 (1924).

most extended discussion of the consent principle came in the "public documents" cases, *Davis* v. *United States*, 328 U.S. 582 (1946); and *Zap* v. *United States*, 328 U.S. 624 (1946); and notwithstanding the admonition that "[w]here officers seek to inspect public documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where private papers are sought,"[5] lower courts have relied on *Davis* and *Zap* in sustaining searches for entirely private items.[6]

Thirdly, concern with appropriate standards to appraise waiver is reflected in the frequent litigation of the validity of consent to a warrantless search in the federal[7] as well as the state[8] courts. The critical role played by

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[5] *Davis* v. *United States*, 328 U.S. 582, 593 (1946).

[6] See, e.g., *Rees* v. *Peyton*, 341 F.2d 859 (4th Cir. 1965), relying on *Zap*.

[7] In addition to the cases collected in the following pages, see these recent federal circuit court decisions, e.g., *Massachusetts* v. *Painten*, 368 F.2d 142 (1st Cir. 1966); *Robbins* v. *MacKenzie*, 364 F.2d 45 (1st Cir. 1966); *United States* v. *Corman*, 355 F.2d 151 (2d Cir. 1965); *Rivers* v. *United States*, 321 F.2d 704 (2d Cir. 1963); *United States* v. *Smith*, 308 F.2d 657 (2d Cir. 1962); *United States* v. *Horton*, 328 F.2d 132 (3d Cir. 1964); *Reeves* v. *Warden*, 346 F.2d 915 (4th Cir. 1965); *Landsdown* v. *United States*, 348 F.2d 405 (5th Cir. 1965); *Robinson* v. *United States*, 325 F.2d 880 (5th Cir. 1964); *Simmons* v. *Bomar*, 349 F.2d 365 (6th Cir. 1965); *United States* v. *Torres*, 354 F.2d 633 (7th Cir. 1966); *United States* v. *Hilbrich*, 341 F.2d 555 (7th Cir. 1965); *Maxwell* v. *Stephens*, 348 F.2d 325 (8th Cir. 1965); *Chapman* v. *United States*, 346 F.2d 383 (9th Cir. 1965); *Davis* v. *California*, 341 F.2d 982 (9th Cir. 1965); *Frye* v. *United States*, 315 F.2d 491 (9th Cir. 1963); *Reed* v. *Rhay*, 323 F.2d 498 (9th Cir. 1963); *Mosco* v. *United States*, 301 F.2d 180 (9th Cir. 1962); *Rogers* v. *United States*, 369 F.2d 944 (10th Cir. 1966); *Schultz* v. *United States*, 351 F.2d 287 (10th Cir. 1965); *McDonald* v. *United States*, 307 F.2d 272 (10th Cir. 1962); *Villano* v. *United States*, 310 F.2d 680 (10th Cir. 1962); *Gatlin* v. *United States*, 326 F.2d 666 (D.C. Cir. 1963).

[8] See, *e.g.*, the California cases collected in *Note*, 51 Calif. L. Rev. 1010 (1963); *State* v. *Hanna*, 150 Conn. 457, 191 A.2d 124 (1963); *State* v. *Scrotsky*, 39 N.J. 410, 189 A.2d 23 (1963); *Commonwealth* v. *Wright*, 411 Pa. 81, 190 A.2d 709 (1963); *Holt* v. *State*, 17 Wis.2d 468, 117 N.W.2d 626 (1962).

waiver determinations is emphasized by recent decisions of the Court stressing a defendant's knowledge of his constitutional rights.[9] Yet the absence of clear federal law establishing standards for a finding of consent itself enables the "consent search" to undercut the protection afforded individuals by the Fourth Amendment. See the Appendix to Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices,* 34 Rocky Mt. L. Rev. 150, 176-179 (1962).

Finally, the decisions of lower courts are in conflict.[10] All courts agree, of course, that consent must be "voluntary" to be effective but differing results reflect differing views on an unarticulated question of law: whether one who does not know and is not told that officers cannot make a search without a warrant should be held to waive the warrant requirement by acquiescing in a request to search. We believe the invasion of privacy shown by this record presents an appropriate occasion for the Court to address itself to this critical question of federal law.

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[9] *E.g., Miranda* v. *Arizona,* 384 U.S. 436 (1966).

[10] Compare *Pekar* v. *United States,* 315 F.2d 319 (5th Cir. 1963), with *United States* v. *Ziemer,* 291 F.2d 100 (7th Cir. 1961). Compare *Higgins* v. *United States,* 209 F.2d 819 (D.C. Cir. 1954) with *United States* v. *MacLeod,* 207 F.2d 853 (7th Cir. 1953). Compare *Reed* v. *Rhay,* 323 F.2d 498 (9th Cir. 1963) with *United States* v. *Evans,* 194 F. Supp. 90 (D.D.C. 1961). Compare *United States* v. *Haas,* 106 F. Supp. 295, 109 F. Supp. 433 (W.D. Pa. 1952) with *United States* v. *Minor,* 117 F. Supp. 697 (E.D. Okla. 1953). Compare the inhospitality toward a finding of consent by the Court of Appeals for the District of Columbia Circuit, e.g., *Judd* v. *United States,* 190 F.2d 649, 651-652 (D.C. Cir. 1951), with the hospitality toward such a finding by the Court of Appeals for the Ninth Circuit, e.g., *Martinez* v. *United States,* 333 F.2d 405, 407 (9th Cir. 1964).

III.

Petitioners' Convictions Are Unsupported by Any Evidence in the Record.

Petitioners were convicted pursuant to Arkansas statutes which punish "any person who shall, by any act, cause, encourage or contribute to" the delinquency of a child.[11] The delinquent child is defined by Ark. Stats. Ann. §§45-204 as a person under eighteen years of age who:

(1) violates a law of this State;

(2) is incorrigible;

(3) knowingly associates with thieves;

(4) knowingly associates with vicious or immoral persons;

(5) without cause or parental consent absents himself from his home;

(6) is growing up in idleness or crime;

(7) knowingly frequents a house of ill-repute;

(8) knowingly frequents any policy shop;

(9) knowingly frequents any place where any gaming device is operated;

(10) patronizes, visits or frequents any saloon or dram shop were intoxicating liquors are sold;

(11) patronizes or visits any public pool room where the game of pool or billiards is carried on for pay or hire;

(12) wanders about the streets in the nighttime without being on any lawful business or occupation;

[11] See *supra*, pp. 3, 4.

(13) habitually wanders about any railroad yards or tracks;

(14) jumps or attempts to jump on any moving train;

(15) enters any car or engine without lawful authority;

(16) smokes cigarettes about any public place or schoolhouse.

(17) is guilty of indecent, immoral or lascivious conduct.

There are thus three elements of a contributory delinquency charge: (1) an act by an adult, (2) whose effect is to cause, encourage or contribute to (3) any of the kinds of behavior which render a child under eighteen a delinquent.

Although the state apparently proceeded on the theory that petitioners contributed to the violation of Ark. Stats. Ann. §48-903.1, *supra,* p. 4 (1964) a "state law" incorporated into the delinquency statutes by §§45-204 (1964), the trial judge, over objection, charged the jury with all 17 kinds of delinquent behavior (R. 74, 75). Thus, we consider whether there was evidence of guilt under any of the 17 definitions.

Only clauses (1), (4), (5) and (17) are conceivably applicable to the factual setting of this case. If, therefore, the State failed to introduce any evidence that the petitioners *acted* in a manner so as to *cause, encourage* or *contribute to* the performance of the *acts enumerated in those clauses* by a person under eighteen years of age, their convictions must be reversed, *Thompson* v. *Louisville,* 362 U.S. 199 (1960).

There is no evidence that petitioners caused, encouraged or contributed to persons under eighteen behaving in an

"indecent, immoral or lascivious" manner under clause (17). There is certainly no suggestion in this record that any of the occupants of petitioners' apartment were behaving indecently or lasciviously. To the contrary, the police officers testified that no one was rowdy or loud or cursed or used obscene language.

There is no evidence in the record that petitioners caused, encouraged or contributed to the absence from their homes of any persons under eighteen years of age, without the consent of their parents under clause (5). The question of parental consent to be away from homes is never raised by any of the testimony.

There is no evidence that petitioners caused, encouraged or contributed to the association of persons under the age of eighteen with "vicious or immoral persons" under clause (4). None of the guests were so characterized. Petitioners were responsible tenants of the Little Rock Housing Authority and the record shows that petitioner John Dokes and the other adults present were regularly and legitimately employed.

Finally, petitioners submit that there is no evidence in the record that they caused, encouraged or contributed to violation of state law by a person under eighteen years of age under clause (1). Although petitioners have never been informed of the specific law in question and a written charge has never been filed by the state, the theory upon which the state apparently proceeded was that petitioners were criminally responsible for a violation of Arkansas liquor laws allegedly committed by persons under eighteen who were uninvited guests in their apartment and to whom they did not give alcohol. Ark. Stats. Ann. §48-903.1, *supra*, p. 4, makes it a misdemeanor for any person un-

der 21 to possess intoxicating liquor, wine or beer.[12] However, the evidence fails to reveal that the Dokes' caused, encouraged or contributed to the possession of liquor, wine, or beer by any one under 18 (the age ceiling of the delinquency statute). There is, simply, evidence that there were beer cans and a few mixed drinks in petitioners' apartment on the night in question. The officers testified that while questioning some of the minors they noticed the odor of alcohol on their breaths, but only one of these minors was identified as being under eighteen years of age as required by the delinquency statute (Compare R. 50 with R. 53) and the officers did not see the Dokes' or anyone else give a minor a drink.[13] Most significantly, petitioners' testimony that both the beer and liquor were brought to the apartment by adult guests, and that they, petitioners, gave no alcoholic beverage to any minor, was not contradicted or rebutted. Indeed, it was corroborated by a member of Dokes' singing group (R. 82).

There is no evidence that petitioners caused, encouraged or contributed to the unlawful possession of alcoholic beverages within their apartment; merely testimony that an admittedly uninvited guest under eighteen had an odor of alcohol on her breath. This was the trial court's view of the case. Although the jury was charged that the State had the burden of proving petitioner's guilt beyond a reasonable doubt (R. 76), the court denied a motion to direct a verdict in favor of petitioners and stated: "I think they

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[12] It should be noted that §48-903.1 also makes *purchasing* alcoholic beverages for a minor a misdemeanor but this offense could not conceivably be the basis of petitioners' conviction. They were charged with contributing to the violation of a state law by a minor and the purchasing offense cannot be committed by a minor.

[13] There is likewise testimony that a *minor* possessed an alcoholic beverage but not that a *person under eighteen* (as required by the delinquency statute) performed this act.

have to make some explanation for the party, being it took place in their apartment. They were responsible for it." And the court directed a verdict of acquittal in favor of two adult co-defendants because the party did not take place in their home (R. 57). Petitioners may not be found criminally responsible, however, for causing, encouraging or contributing to delinquency *solely* because the "delinquency" took place in their home.

This case is controlled by the reasoning of *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), a case relied upon to support the holding in *Thompson* v. *Louisville, supra*. See 362 U.S. 206 n. 13 (1960). At issue was a finding that petitioner did not have a good moral character. Although he introduced uncontradicted evidence of good character, the Bar Examiners relied upon the facts that (1) petitioner had in the past used aliases, (2) he had been arrested on at least two occasions, but never tried or convicted, (3) he had at one time been a member of the Communist Party, to support its finding that Schware lacked the requisite character to become a member of the New Mexico bar. Mr. Justice Black, for the court, found that there was "no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law" (353 U.S. at 246-47). In a concurring opinion, Mr. Justice Frankfurter expanded upon the majority's rationale (353 U.S. at 251):

> This brings me to the inference that the [New Mexico] court drew . . . To hold as the court did . . . is so dogmatic an inference as to be wholly unwarranted. . . . But facts of history that we would be arbitrary in rejecting bar the presumption, let alone an irrebuttable presumption, that response to foolish, baseless hopes regarding the betterment of society made those who had entertained them but who later undoubtedly came

> to their senses and their sense of responsibility "questionable characters." Since the Supreme Court of New Mexico as a matter of law took a contrary view of such a situation in denying petitioner's application, it denied him due process of law.

Here as in *Schware,* the "inference" is "unwarranted". Because of a smell of alcohol on the breath of one person under eighteen in their apartment petitioners did not cause, encourage or contribute to the minor's possession of alcohol, a violation of state law which amounts under this statute to juvenile delinquency.

IV.

Petitioners Were Convicted Under a Contributory Delinquency Statute So Sweeping and Vague as to Deny Them Due Process of Law Guaranteed by the Fourteenth Amendment.

Petitioners' conduct was criminal under the following standard of §45-239 Ark. Stats Ann.:

> Any person who shall, by any act, *cause, encourage* or *contribute* to the dependency or delinquency of a child as these terms with reference to children are defined by this act or who shall *for any cause, be responsible* therefor . . . (italics supplied).

The italicized terms denominate the degree of influence upon the conduct of a child under eighteen which an adult must exert in order to be guilty of contributory delinquency. The definition of delinquency incorporated in the statute refers to 17 forms of delinquency enumerated in §45-204, *supra,* p. 3, which define a delinquent child as one who is, *inter alia,* "growing up in idleness", who "smokes

cigarettes about any public place or about any schoolhouse", who "associates with vicious or immoral persons", who is "guilty of . . . immoral . . . conduct" or who "violates a law of this State".

The Supreme Court of Arkansas, in response to petitioners' claim that the record revealed no evidence of guilt, construed §45-239 expansively, holding that "it is only necessary for the state to prove a condition or circumstances existing that would tend to cause, encourage or contribute to the delinquency of a child" *infra*, p. 4a. In short, the indicia of delinquency incorporated in the contributory delinquency statute need not be shown to have actually occurred; merely conditions or circumstances tending to establish them are necessary. At the same time the Supreme Court of Arkansas did not define, but merely reasserted, the statutory words "cause, encourage or contribute to."

Such statutes have potential for grave conflict with federal freedoms. This is because the First Amendment protects freedom of association, and the heart of any contributory-delinquency statute is regulation of the association of adults and children. These statutes do not punish simply aiding-and-abetting criminal conduct by a child; they punish the sort of *relationship* between the adult and the child which is likely, in the State's view, to have ill effects on the child. Arkansas' focus on the maintenance of a "condition" or "circumstances" highlights the problem. The "condition" and "circumstances" spoken of here are incidents of an associative relationship. When the State seeks to regulate those incidents, and to prescribe the conditions and circumstances under which individuals will be permitted to associate, it touches very close to the core of the First Amendment. Here, the strict standards of permissible statutory vagueness apply.

NAACP v. *Button*, 371 U.S. 415, 432 (1963); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

Because the Arkansas statutes are in many respects typical this case presents an appropriate occasion for consideration of whether catchall delinquency statutes are sufficiently certain to withstand the close scrutiny required by the Constitution, even though §§45-204, 239 themselves have been amended.[14] Compare *Spencer* v. *Texas*, 385 U.S. 554, 556, Note 2 (1967).

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[14] The statutes now read as follows:

§45-239. Persons contributing to delinquency. Any person who shall cause, aid, or encourage any person under eighteen (18) years of age to do or perform any act which if done or performed would make such person under eighteen (18) years of age a "delinquent child" as that term is defined herein, shall be guilty of a misdemeanor. Provided that when any person is charged by indictment or information with a violation of this Act, such indictment or information shall state the specific act with which the defendant is charged to have committed in violation of this Act. Any person convicted of a violation of this section shall be punished by imprisonment for not less than sixty (60) days nor more than one (1) year, and by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). Provided, the court may suspend or postpone enforcement of all or any part of the sentence or fine levied under this section if in the judgment of the court such suspension or postponement is in the best interest of any dependent, neglected or delinquent child as these terms are defined in this act.

§45-204. Delinquent child. The term "delinquent child" shall mean and include any person under eighteen (18) years of age:

(a) Who does any act which, if done by a person eighteen (18) years of age or older, would render such person subject to prosecution for a felony or a misdemeanor;

(b) Who has deserted his or her home without good or sufficient cause or who habitually absents himself or herself from his or her home without the consent of his or her parent, step-parent, foster parent, guardian, or other lawful custodian;

(c) Who, being required by law to attend school, habitually absents himself or herself therefrom; or

(d) Who is habitually disobedient to the reasonable and lawful commands of his or her parent, step-parent, foster parent, guardian or other lawful custodian.

Any reputable person may initiate proceedings against a person under eighteen (18) years of age under this Act by filing a petition therefor

These laws "condemn" an "extraordinarily wide range of adult behavior . . ." Geis, Contributing to Delinquency, 8 St. Louis U.L.J. 59, 75 (1963) and they have been sharply criticized.[15] The delinquency statutes under which petitioners were convicted are representative of state criminal legislation in this area and the constitutional defects from which they suffer are common to nearly all state laws on this subject. All fifty states and the District of Columbia have created the crime of contributory delinquency, the statutes typically include "any person" or "any other person" whom the court finds has contributed to the delinquency of a child, no matter how slight the contact between adult and minor. Nearly all States prohibit acts which "encourage or contribute to delinquency," adding, variously, "aid," "tend to cause," "cause," "promote," "produce," etc.[16] Thus, for example, the Colorado law provides:

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with the juvenile court. All such proceedings shall be on behalf of the State and in the interest of the child and the State and due regard shall be given to the rights and duties of parents and others, and any person so proceeded against shall be dealt with, protected or cared for by the county court as a ward of the State in the manner hereinafter provided.

[15] See Geis, *ibid;* Ludwig, *Delinquent Parents and the Criminal Law,* 5 Vand. L. Rev. 719 (1952); cf. Ludwig, Youth & the Law (1955); Gladstone, *The Legal Responsibility of Parents for Juvenile Delinquency in New York,* 21 Brooklyn L. Rev. 172, 180 (1955); Rubin, *Are Parents Responsible for Juvenile Delinquency?* in Crime & Delinquency 35 (2d ed. 1961); Rubin, *Should Parents Be Held Responsible for Juvenile Delinquency?,* 34 Focus 35 (March 1955). The Standard Juvenile Court Act specifically omits any law of contributory delinquency, 5 N.P.P.A.J. 323, 346 (1959); the Model Penal Code reserves its sanctions for parents alone, and then only for gross breaches of responsibility. Model Penal Code §230.4, p. 192 (P.O.D. 1962) commentary to §207-13, p. 183 (Tent. draft No. 9, 1959).

[16] Ala. Code Ann. Tit. 13 §366 (Recomp. 1958); Alaska Stat. Ann. §11.40.130 (1962); Ariz. Rev. Stat. Ann. §13-822 (1956); Cal. Penal Code (West) §272 (Supp. 1966); Colo. Rev. Stat. §22-7-1 (1963); Conn. Gen. Stat. Ann. §53-254 (1958); D.C. Code Enc. §16-2314(b) (1966); Fla. Stat. Ann. §828.21 (1965); Ga. Code Ann. §§24-9904, 26-6802

> Any person who shall encourage, cause or contribute to the dependency, neglect, or delinquency of a child or shall do any act to directly produce, promote or contribute to the conditions which render such a child a dependent, neglected or delinquent child. . . .[17]

Although a very few contributory delinquency statutes are self-contained, and include a listing of the qualities which render a child delinquent (and thus subject an adult to punishment),[18] the vast majority of statutes make implicit or explicit reference to other state laws to provide the definition of "delinquent child" or "delinquency." Parallels exist between the statutes under which peti-

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(Repl. 1959); Hawaii Rev. Laws §330-6 (1955); Idaho Code §16-1817 (Supp. 1965); Ill. Stat. Ann. (Smith-Hurd) ch. 23 §2361a (Supp. 1966); Ind. Stat. Ann. (Burns) §9-2804 (Repl. 1956); Iowa Code Ann. §233.1 (1949); Kan. Stat. Ann. §38-830(a) (1964); Ky. Rev. Stat. §208.020 (3)(a) (1958); La. Rev. Stat. Ann. (West) Tit. 14 §92.1(A) (Supp. 1966); Me. Rev. Stat. Ann. Tit. 17 §859 (1964); Md. Code Ann. Art. 26 §§53(c), 76(f), 79 (Repl. 1966); Mass. Ann. Laws ch. 119 §63 (Supp. 1965); Mich. Stat. Ann. §28.340 (Repl. 1962); Minn. Stat. Ann. §260.315 (Supp. 1966); Mo. Stat. Ann. §559.360 (Supp. 1966); Mont. Rev. Codes Ann. §10-617 (Supp. 1965); Neb. Rev. Stat. §28-477 (Supp. 1965); Nev. Rev. Stat. §201.110 (1965); N.H. Rev. Stat. Ann. ch. 169 §32 (Supp. 1965); N.J. Stat. Ann. §2A:96-4 (1953); N.M. Stat. Ann. §40A-6-3 (Repl. 1964); N.Y. Penal Law §494; N.C. Gen. Stat. Ann. §110-39 (Repl. 1966); N.D. Century Code Ann. §14-10-06 (Repl. 1960); Ohio Rev. Code Ann. §2151.41 (1953); Okla. Stat. Ann. Tit. 21 §856 (1958); Ore. Rev. Stat. §167.210 (Repl. 1965); R.I. Gen. Laws §11-9-4 (1956); S.C. Code Ann. §16-555.1 (1962); S.D. Code §43.0409 (1939); Tenn. Code Ann. §37-270 (Supp. 1966); Tex. Penal Code (Vernon) Art. 534a (Supp. 1966); Utah Code Ann. §55-10-80(1) (Supp. 1965); Vt. Stat. Ann. Tit. 13 §1301 (1958); Va. Code Ann. §18.1-14 (Repl. 1960); Wash. Rev. Code Ann. §13.04.170 (1962); W. Va. Code Ann. §49-7-7 (1966); Wis. Stat. Ann. §48.45(4)(a) (1957); Wyo. Stat. §§14-7, 14-23(a) (Repl. 1965).

[17] Colo. Rev. Stat. §22-7-1 (1963).

[18] *E.g.*, Iowa Code Ann. §233.1 (1949); La. Rev. Stat. Ann. (West) Tit. 14 §92.1 (Supp. 1966); Mont. Rev. Codes Ann. §10-617 (Supp. 1965); S.C. Code Ann. §16-555.1 (1962); Vt. Stat. Ann. Tit. 13 §1301 (1958).

tioners were convicted and many other state definitional statutes.[19] Especially prominent are the recurrent prohibitions against association with "vicious or immoral persons," or "growing up in idleness or crime."[20]

Although not all legislatures have defined delinquency in such broad terms,[21] most contributory delinquency laws share the vice of unclear denomination of the acts which are sought to be proscribed. Consistent with the view of the Arkansas Supreme Court most state laws do not require a minor to have been made a delinquent in order for an adult to have contributed to his delinquency.[22] Such terms are employed as "tends to cause," Nev. Rev. Stat. §201.110 (1965); "encourages," Minn. Stat. Anno. §260.27 (1959); "contribute to the conditions," Colo. Rev. Stat. §22-7-1 (1963); and "responsible for . . . conditions which

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[19] See, e.g., Alaska Stat. Ann. §11.40.150 (1962); Fla. Stat. Ann. §39.01(11) (1961); Ind. Stat. Ann. (Burns) §9-2803 (Repl. 1956); Md. Code Ann. Art. 26 §§52(e), 78(b) (Repl. 1966); Mont. Rev. Codes Ann. §10-617 (Supp. 1965); Okla. Stat. Ann. Tit. 21 §857 (1958); S.C. Code Ann. §16-555.1 (1962); S.D. Code §43.0301 (1939); Tenn. Code Ann. §37-242 (Supp. 1966).

[20] *Ibid.*

[21] Examples of narrower definition include Del. Code Ann. Tit. 10 §§901, 1101 (1953); Ill. Stat. Ann. (Smith-Hurd) ch. 23 §2360(a) (Supp. 1966); Mass. Ann. Laws ch. 119 §52 (Supp. 1965); Neb. Rev. Stat. §43-201 (Supp. 1965); Wash Rev. Code Ann. §1304.010 (1962).

[22] *E.g., Smithson* v. *State,* 34 Ala. App. 343, 39 So.2d 678 (1950); *Anderson* v. *State,* Sup. Ct. Op. #156 (File 271); 384 P.2d 669 (Alaska 1963); Ariz. Rev. Stat. §13-823 (1956), see *State* v. *Locks,* 94 Ariz. 134, 382 P.2d 241 (1963); *People* v. *Calkins,* 48 Cal. App. 2d 33, 119 P.2d 142 (1941); Del. Code Ann. Tit. 11 §431(a)(3) (Supp. 1964); *State* v. *Drury,* 25 Idaho 787, 139 Pac. 1129 (1914); La. Rev. Stat. Ann. (West) Tit. 14 §92.1(A) (Supp. 1966); Me. Rev. Stat. Ann. Tit. 17 §860 (1964); Mich. Stat. Ann. §28.340 (Repl. 1962); *State* v. *Johnson,* 145 S.W.2d 468 (Mo. App. 1940); *People* v. *Dritz,* 259 App. Div. 210, 18 N.Y.S.2d 455 (1940); *State* v. *Griffin,* 93 Ohio App. 299, 106 N.E.2d 668 (1952); *Wallin* v. *State,* 84 Okla. Cr. 194, 182 P.2d 788 (1947); *Commonwealth* v. *Jordon,* 136 Pa. Super. 242, 7 A.2d 523 (1939); S.D. Code §43.0409 (1939); *Lavvorn* v. *State,* 389 S.W.2d 252 (Tenn. 1965); W. Va. Code Ann. §49-7-8 (1966); Wis. Stat. Ann. §48.45(5) (1957).

may cause," Conn. Gen. Stat. Anno. §53-254 (1960). Furthermore, under many state laws, including Ark. Stat. Ann. §45-239, a defendant may be convicted without having intended to affect the juvenile in any way.[23]

The Arkansas statutes do not as written, or as supplemented by the interpretations of the Supreme Court of Arkansas, provide an ascertainable standard of criminality or guilt. The definition of the actions which may be punished is so broad that it is effectively relegated to the police, and ultimately to the courts, for *ad hoc* determination after the fact in every case. As the facts of this case clearly demonstrate this vague statute is subject to "sweeping and improper application," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963) by the police to harass the innocent participants in an orderly, but unpopular, interracial social gathering.[24] Where, as here, a constitutional

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[23] While some statutes include modifiers such as "knowingly or wilfully," N.H. Rev. Stat. Ann. ch. 169 §32 (Supp. 1965), others, e.g., Me. Rev. Stat. Ann. Tit. 17 §859 (1964) do not. In some instances, the requirement of *scienter* has been very specifically read out of the statute. See *Anderson* v. *State*, Sup. Ct. Op. #156 (File 271), 384 P.2d 669 (Alaska 1963). It must be emphasized that juvenile and contributory delinquency are not common law crimes presumed to attain a certain specificity, but entirely the product of statute. *Cf. Champlin Ref. Co.* v. *Corporation Comm'n*, 286 U.S. 210, 242-43 (1942).

[24] These statutes permit arbitrary disposition of adults who are involved along with young people in unpopular social movements. Juveniles, for example, have comprised a large proportion of those who in the past decade have peacefully demonstrated for their civil rights and have been unlawfully arrested for asserting constitutionally protected rights. The treatment accorded these minor Negroes demonstrates the capacity to punish for reasons totally unrelated to individual welfare of the child. In one of the few studies of the subject, the United States Civil Rights Commission concluded that " . . . local authorities used the broad definition afforded them by the absence of safeguards [in juvenile proceedings] to impose excessively harsh treatment on juveniles." U. S. Comm'n on Civil Rights Report, Law Enforcement, 1965, pp. 80-83.

The place the Commission studied was Americus, Georgia where:

> "Approximately 125 juveniles were arrested during the Americus demonstrations, and their cases disposed of in a unique manner. Some

right to privacy is involved, the principle that penal laws may not be vague must, if anything, be enforced even more stringently. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

The court below held that "it is only necessary for the state to prove a condition or circumstance existing that would tend to cause, encourage or contribute to the delinquency of a child." Thus the words "cause, encourage or contribute to" found in the statute are left unrestricted. The chance that "the ordinary person can intelligently

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of them were released from jail upon payment of a jail fee of $23.50, plus $2 per day for food. These fees were paid by parents who agreed to send their children to relatives living in the country. No court hearing was held in these cases; of those juveniles who appeared in court (approximately 75% of those arrested) about 50 were sentenced to the State Juvenile Detention Home and placed on probation on the condition that they would not associate with certain leaders of civil rights organizations in Americus.

"Many juveniles arrested in Americus were detained for long periods of time without bail or hearing. The juvenile court judge explained the reason for this in Federal court: 'If one is bad enough to keep locked up, they're not entitled to bail; and if they're not bad enough, there's no use to make them make bond'." *Id.* at pp. 81-82.

See also Meltsner, "Southern Appellate Courts: A Dead End" in Friedman (ed.), Southern Justice 152 (1965).

Although the reported decisions are few, petitions to adjudge minors delinquent because of peaceful and lawful civil rights activity has been a common response in southern states. Ten minor Negroes were arrested in Montgomery, Alabama on April 15, 1965, as they were peacefully picketing a store in downtown Montgomery and objecting to its discriminatory hiring practices. They were prosecuted under an ordinance which stated that "not more than six persons shall demonstrate at any one time before the same place of business or public facility." Although their conduct was orderly in every respect attempts were made to declare the children delinquents. A federal district judge found that they were merely exercising a constitutionally protected right of free speech and assembly and dismissed the charges. *In re Wright*, 251 F. Supp. 880 (M.D. Ala. 1965). See also *Florence* v. *Meyers*, 9 Race Rel. L. R. 44 (M.D. Fla. 1964) (order to arrest juveniles on sight unlawful; injunction granted); *Griffin* v. *Hay*, 10 Race. Rel. L. Re. 111 (E.D. Va. 1965) (order that juveniles refrain from protected activity unlawful; injunction granted). See generally Starrs, A Sense of Irony in Juvenile Courts, 1 Harv. Civil Rights—Civil Liberties L. Rev. 129 (1966).

choose, in advance, what course it is lawful for him to pursue," *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926), without running afoul of this law, is reduced to the vanishing point by reference to encouraging "a condition or circumstance" and to the entire corpus of state law in defining delinquency. And the numerous, open-ended, definitions of delinquency found in §45-204 are conducive to "harsh and discriminatory enforcement . . . against particular groups," *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1941), for they make the boundary between lawful and unlawful conduct as vague and indefinite as possible.

This statute shares the typical vagueness of contributory delinquency statutes illustrated vividly by the comment of an Ohio judge that "you could convict a drunk for staggering out of a saloon so that a passing child could see his condition and go imitate him," *State* v. *Crary*, 10 Ohio Op. 2d 36, 38, 155 N.E. 2d 262, 264 (1959). As the Report of the President's Commission on Law Enforcement and Administration of Justice emphasizes, this antiquated, standardless approach to the growing problem of delinquency is misguided and may in fact harm the very interests of the juvenile sought to be protected.[25]

[25] The Challenge of Crime in a Free Society (1967) pp. 78-88.

CONCLUSION

WHEREFORE, petitioners pray that the petition for writ of certiorari be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX

Opinion of Supreme Court of Arkansas

No. 5224

Opinion Delivered

Appeal From Pulaski Circuit Court

First Division

Affirmed

John Henry Dokes and Sylvia Dokes,

Appellants,

—v.—

State of Arkansas,

Appellee.

Hugh M. Bland, Justice

Hugh M. Bland, J. The appellants are husband and wife and live in an apartment at 287 Granite Mountain Circle in the Booker Home Project.

On the night of January 30, 1965 at about 11 o'clock p.m., Officer Jim Harris of the Little Rock Police Department, who was also employed as night watchman for the Little Rock Housing Authority, observed an unusual amount of traffic entering the Booker Home Project. Several of these automobiles first went to the liquor store across the street and the occupants made purchases. At his request, Officers Parsley and Terry came to the Project. As the three officers approached the apartment where all the cars had congregated, two men and a lady came from the apartment. The officers identified themselves and Sylvia Dokes, one of these persons, invited them to the apartment. Upon

entering the apartment, the officers observed several people in the living room, kitchen and storage room. In all three of these areas there were beer cans and mixed drinks. There were twenty-two people in the apartment, some were adults, some were minors, the youngest being a girl aged fourteen. Officer Parsley testified that this minor, aged fourteen, had the smell of liquor on her breath; Janet Kirspel, aged nineteen, had a mixed drink in her hand which was later claimed by Sylvia Dokes as her drink. Other adults in the party admitted to the officers that they had been drinking. The officers did not have a search warrant and did not have a warrant of arrest.

All twenty-two persons were taken to the Police Station and the adults were charged with Contributory Delinquency and the minors with possession of intoxicating beverages.

Appellants, after pleading not guilty to the charges against them, were tried in the Municipal Court of Little Rock on May 4, 1965, found guilty and fined $25.00 plus $10.50 costs each. An appeal was perfected by appellants to the Circuit Court of Pulaski County where they filed a motion to dismiss the information and to suppress the evidence. These motions were overruled by the Circuit Court. Trial was held on April 8, 1966 before a jury; both defendants were found guilty and a fine fixed at $200.00 each. Appellants filed a motion for new trial which was overruled and an appeal was perfected to this court.

An examination of the motion for new trial and the points relied upon for reversal reveals only two points that can be considered by this court: (1) The search was unreasonable and in violation of the Constitution of Arkansas, Art. 2, §15, and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, (2) the State failed to prove the necessary facts to sustain the conviction for contributory delinquency.

The defendants did not challenge or put in issue the sufficiency of the evidence.

Was the appellants' constitutional protection against unreasonable search violated by the officers? The officers, after identifying themselves as officers, were invited into the apartment by Sylvia Dokes, one of the appellants herein. No demand was ever made by her on the officers for a search warrant but the evidence clearly disclosed that she waived the right to a search warrant. *Williams v. State,* 237 Ark. 569, 375 S.W. 2d 375 (1964), quotes from 79 C.J.S. Searches and Seizures §62, p. 816 et seq. which contains a discussion of waiver and consent and the holdings from the various jurisdictions, including the United States Supreme Court, are summarized as follows:

> "The constitutional immunity from unreasonable searches and seizures may be waived, as by a voluntary invitation or consent to a search or seizure. Thus individuals may waive their immunity to illegal searches of their persons, possessions, or dwelling houses, as well as to the illegal search of their premises, places of business, and searches and seizures of books, papers, or records. Hence, one who has thus consented to a search cannot thereafter complain of irregularities in the search warrant, or question its sufficiency or the manner of its issuance, since an invitation or consent to the search dispenses with the necessity of a search warrant altogether." [Also see 47 Am. Jur., Searches and Seizures, p. 548, §71.]

We see no merit in appellants' contention that there was an unlawful search.

As to appellants' second contention, the State proved there was a congregation of adults and minors in appellants' apartment where intoxicating liquor was being

served. The statute on contributory delinquency, Ark. Stat. Ann. §45-239 (Repl. 1964) provides that:

> "Any person who shall, by any act, cause, encourage or contribute to the dependency or delinquency of a child * * * or who shall, for any cause, be responsible therefor, shall be guilty of a misdemeanor * * *."

Appellants contend that it was necessary for the State to prove that the minors in question were, in fact, delinquents before appellants could be found guilty of contributing to their delinquency. In *Williams* v. *City of Malvern*, 222 Ark. 432, 261 S.W.2d 6, we held that a person may be found guilty of contributing to the delinquency of a minor, under our statute, by acts which directly tend to cause delinquency, whether that condition actually results or not. This follows the majority view as it was said in 4 Arkansas Law Review, p. 478:

> "* * * The essence of the majority view is that requiring the child to have been a delinquent at the time the acts were committed or to be one as a consequence thereof would not be consonant with the beneficent purpose of the legislature, *viz.*, to stamp out juvenile delinquency at its roots."

We are committed to the rule that it is only necessary for the State to prove a condition or circumstances existing that would tend to cause, encourage or contribute to the delinquency of a child. The State met that burden and the conviction is well supported by the evidence.

All of the other points for reversal were not brought into the motion for a new trial and cannot be considered for the first time on appeal to this Court. *Watkins* v. *State*, 222 Ark. 444, 261 S.W.2d 274; *Hardin* v. *State*, 225 Ark. 602, 284 S.W.2d 111.

Finding no error, the judgment of conviction is affirmed.

Denial of Petition for Rehearing

IN THE SUPREME COURT OF ARKANSAS

OCTOBER TERM 1966

PROCEEDINGS OF JANUARY 30, 1967

JOHN HENRY DOKES, *et al.*,

Appellants,

—v.—

(Pul. 1st Div., William J. Kirby, J.)

STATE OF ARKANSAS,

Appellee.

Petition for rehearing is denied.

SUPREME COURT, U. S.
RECEIVED
JUL 14 1967
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

Office-Supreme Court, U.S.
FILED
JUL 14 1967
JOHN F. DAVIS, CLERK

No. 109

JOHN HENRY DOKES AND SYLVIA DOKES, *Petitioners,*

v.

STATE OF ARKANSAS, *Respondent.*

BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. _____

JOHN HENRY DOKES AND SYLVIA DOKES, _____ *Petitioners,*

v.

STATE OF ARKANSAS, _____ *Respondent.*

BRIEF IN OPPOSITION

CITATION TO DECISION BELOW

The decision of the Supreme Court of Arkansas is reported at _____ Ark. _____, 409 S.W. 2d 827.

JURISDICTION

Jurisdiction of this Court is prayed for by petitioner pursuant to 28 U.S.C. §1257 (3). Respondent asserts that certiorari should not be granted since there are no substantial questions raised in this petition which would warrant review by this Court.

STATEMENT OF THE CASE

On the night of January 30, 1965, a member of the Little Rock City Police force, Officer Jim Harris, was working at his off-duty job as a night watchman in the Booker Home Project. At about 11:00 p.m. Officer Harris observed a string of cars drive into the project. He noticed this unusually large amount of traffic and also observed that several of these automobiles were carrying white boys and girls, which is very unusual (T.25). He also noticed that several of the cars carrying what appeared to him to be minors stopped at a liquor store and went in and made purchases before driving into the Booker Home Project. Officer Harris went to the liquor store and talked to the proprietor concerning what was bought and who made the purchases (T.26, 33). He then drove through the project and got the location where all the people had parked (T.26) and then went back to the liquor store and used the phone and called the vice squad (T.27). Two officers from the vice squad came and joined Officer Harris and together they started toward the location of the parked cars. When they approached the apartment in front of the place where the cars were parked, they saw three people coming from the apartment. At that time they identified themselves as police officers and inquired where they might be going. Subsequently, Sylvia Dokes, lessee of the apartment, consented for the officers to go into the apartment and look around (T.27). Once inside the apartment the officers observed 22 people sitting around drinking beer and other liquor. They talked to some of the boys and girls and got their names and ages and found out that the youngest person there was 14 years old. They also found out that some of the people were adults, including John Henry and Sylvia Dokes. After further investigation they directed everyone to go down to police headquarters where charges

were filed (T.29, 30). On cross-examination Officer Harris testified that he would have done the same thing had all the people been Negroes because of his suspicion that minors were drinking alcoholic beverages (T.35). John Henry Dokes and his wife, Sylvia Dokes, were charged under Arkansas Statutes Annotated §45-239 (1964 Replacement) with contributing to the delinquency of minors. The case was first tried in the Municipal Court in Little Rock, Arkansas, wherein a judgment of guilty was entered. An appeal was taken to the Circuit Court of Pulaski County, Arkansas, and after a trial by a jury of twelve of their peers the defendants were found guilty as charged. On appeal to the Supreme Court of Arkansas the convictions were affirmed and are reported as *John Henry Dokes and Sylvia Dokes* v. *State of Arkansas*, _____ Ark. _____, 409 S.W. 2d 827.

QUESTIONS PRESENTED

I

Whether the search was constitutional under the Fourth and Fourteenth Amendments to the Constitution of the United States.

II

Whether the evidence was sufficient for a conviction of contributing to the delinquency of a minor.

III

Whether Arkansas Statutes Annotated §45-239 (1964 Replacement) is constitutional.

ARGUMENT

I

The search was constitutional under the Fourth and Fourteenth Amendments to the Constitution of the United States since consent was given for the officers' entrance and subsequent search.

Petitioners allege that the entrance and search by the officers of the Dokes apartment violated the Fourth Amendment to the United States Constitution which was made to apply to the states by the Fourteenth Amendment to the United States Constitution. Petitioners, however, recognize and purportedly adhere to the principal that when a waiver of these rights is given by the person in charge of the property then the search may be conducted constitutionally. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). Mrs. Dokes gave her permission for the officers to enter the apartment by taking them back to the apartment, and she made no objection to the entrance (R.31, 41). This is even more clearly pointed out by Mrs. Dokes' own testimony on pages 71 and 72 of the record. The officers identified themselves as officers and never demanded to enter the apartment. It is also clear that Mrs. Dokes never demanded a search warrant and the evidence clearly discloses that she waived the right to complain about any search without a warrant. *Williams* v. *State,* 237 Ark. 569, 375 S.W. 2d 375; *Brookhart* v. *Janis,* 384 U.S. 1 (1966). Further, the record is clear that there was no implied coercion and that Mrs. Dokes did not have to waive her Fourth Amendment rights.

We realize that the waiver of a constitutional right must be shown by strong and convincing evidence. Petitoiners claim that the evidence of consent in this record

is inconsistent, incomplete and conclusory testimony of the arresting officers and that it fails to meet the State's burden of proof. We oppose this vigorously as it is apparent from the officers' testimony that consent was given, and if we use the test that petitioners advocate it would be necessary for Mrs. Dokes to testify to the same circumstances as did the officers. In criminal proceedings it is not uncommon that the testimony of the defendants may differ somewhat from that of the State's witnesses and certainly the trier of fact may determine what evidence is more convincing and credible. It is obvious here that the testimony of the police officers which was corroborated to a large extent by Mrs. Dokes was accepted by the trier of fact as being an explanation of what occurred. It is our position that the trier of fact was in a better position to determine the credibility of the evidence as this testimony was given in open court in a public trial. We would certainly discourage this Court from taking a written record and coming to a different conclusion than one who had heard the evidence and seen the way the witnesses testified. It seems clear to us that an intelligent and knowing waiver of the Fourth Amendment right against unreasonable searches and seizures was made by Mrs. Dokes, and it further is even clearer to us from the record that the search which was made was reasonable. The officers testified that they only looked around and observed beer and mixed drinks before they arrested the petitioners. Surely they had probable cause to make a search because one officer had seen minors going in a liquor store and coming out with packages and then going to the Dokes apartment. This would have been sufficient information for them to have obtained a search warrant, but when a voluntary consent to search is given then a search warrant is unnecessary.

II

This Court should not exercise its certiorari jurisdiction in this case as the law is clear on consent for searches and does not need either re-examination or reiteration.

Petitioners contend that the Fourth Amendment to the United States Constitution as applied to searches and seizures where voluntary consent is given to police officers to make a search and seizure needs reiteration or re-examination. They contend that since the Court has not directly ruled on a case involving the voluntariness of consents to searches and seizures in the past few years makes it necessary for the Court to grant certiorari and clarify the law for cases arising today. Practically speaking, this seems to be a preposterous proposition because this Court has considered several cases in the last three or four years involving the Fourth Amendment and other constitutional rights which tend to clarify and make unambiguous the state of the law on this subject. We will not attempt to enumerate these cases or the many reported cases of the Circuit Courts of Appeals or the cases of the various state appellate courts as this would seem to be superfluous. Suffice it to say that we can find no reasonable grounds to state to the Court that the decisions of the lower courts are in conflict to such an extent that these questions addressed to the Court should be decided strictly for the sake of clarifying the law.

III

Petitioners' convictions are supported by the evidence in the record.

The petitioners contend that it would be necessary for the State to prove that the minors in question were in fact delinquents before petitioners could be found guilty of contributing to their delinquency, and also it appears that they contend that to prove that petitioners were contributing to their delinquency it would be necessary to prove that they encouraged, caused or contributed to their delinquency. This would seem to us to be a question to be determined by the State appellate court as it involves an interpretation of a State statute. The Supreme Court of Arkansas has already determined these questions in this case as reported on page 829 of 409 S.W. 2d (*Dokes, et ux.* v. *State*). The Supreme Court of Arkansas quoted the statute on contributory negligence (Ark. Stat. Ann. §45-239 [Repl. 1964]), which provides that:

> "Any person who shall by any act cause, encourage, or contribute to the dependency or delinquency of the child * * * or who shall, for any cause, be responsible therefor, shall be guilty of a misdemeanor * * * ."

The evidence is clear here that minors as young as 14 years of age were discovered in the apartment of petitioners with the ordor of liquor on their breath and with beer and mixed drinks all over the apartment (T. 28, 37, 42, 43). Further, one of the officers testified that one minor was holding a glass of whiskey when the officers came in, and when they began to question her of the whiskey Mrs. Dokes ran to the girl's side and said, "No, that's mine" (T.48, 49). This same officer testified of the odor of alcohol on the minor's breath (T.50).

Mrs. Dokes testified that Mrs. Dokes didn't take any liquor away from any of the minors (T.63).

Petitioners further state that it was necessary for the State to prove that the minors in question were in fact delinquent before petitioners could be found guilty of contributing to their delinquency. In *Williams* v. *City of Malvern*, 222 Ark. 432, 261 S.W. 2d 6, the Arkansas Supreme Court held that a person may be found guilty of contributing to the delinquency of a minor under our statute for acts which directly tend to cause delinquency, whether that condition actually results or not. In writing that decision the Arkansas Court adopted the reasoning used by the Oklahoma Supreme Court in *Wallin* v. *State*, 840 Okla. Cir. 194, 182 O. 2d 788, in construing a statute similar to the Arkansas Statute as follows:

> " . . . In construing this act, we must keep in mind that the purpose of the juvenile delinquency statutes is to protect youth of the State from those evil and delinquent persons who would lead them astray. We are not inclined in the slightest to impair the usefulness and strength of these statutes by placing upon them a narrow, limited and strict construction.
>
> "Such protective statutes should be liberally construed. A liberal interpretation of the juvenile delinquency statutes arms the State with a two-edged sword, to protect children not delinquent from the suggestions of delinquency, as well as for the punishment of those who might commit such acts as to a child already delinquent. In this connection it is not necessary that delinquency result from acts tending to contribute to delinquency . . . "

Although no particular minors were identified as being delinquent here, the jury found that the petitioners

were guilty of such acts that would tend to cause delinquency; which is all that is necessary for a conviction under our statute.

We can further rely on the Arkansas Supreme Court's decision in this case as authority of the Arkansas court's interpretation of the law. In no way can we find that this is in conflict within the meaning of the rule of *Thompson* v. *Louisville,* 362 U.S. 199 (1960). It is apparent from the record that the evidence was sufficient for the jury to find the petitioners guilty as they did. 4 Ark. L. Rev. p. 478.

IV

Ark. Stat. Ann. §45-239 is not so sweeping and vague as to deny petitioners due process of law guaranteed by the Fourteenth Amendment.

The petitioners contend that Ark. Stat. §45-239:

> "Any person who shall, by any act, cause, encourage or contribute to the dependency or delinquency of a child as these terms with reference to children are defined by this act or who shall for any cause, be responsible therefor . . . "

is unconstitutional because the statute is so sweeping and vague that it denies petitioners due process of law. Petitioners have set out in their brief citations to statutes in other states which they admit are similar to the Arkansas Statutes and by reference attempt to induce this Court to rule on their constitutionality, too. Statutes such as this are not so vague and uncertain because they refer to actions which adults may take which would influence a minor to perform similar acts which would

cause him to be a delinquent. The purpose clearly is to protect minors from adults' conduct which is socially unacceptable in the light of modern times. Applying the factual situation here to this statute, there can be no vagueness or uncertainty because the Dokes had put the minors in a position whereby they would be in violation of State law by drinking alcoholic beverages before they reach the age of 21. It is preposterous to us that anyone who serves liquor to minors or makes it available for them could be doing anything except causing their delinquency. Specific enumeration of conduct of adults which would be forbidden under this statute would be impossible because it would restrict a fair and impartial interpretation of the purposes of the statute. It necessarily has to be broad in order to encompass the changing attitudes of society so that it may be effective. Otherwise, it would only seem reasonable that at every meeting of the legislature the statute would have to be changed or reenacted so that the specifics could be fully enumerated in light of modern society's thinking. This statute also should be judged by the factual situations which come under it and not abstractly by using theory only. Certainly the Arkansas Statute as written and as interpreted by the Supreme Court of Arkansas provides an ascertainable standard by which a court may determine the guilty or innocence of one charged under this Act. It is reasonable to believe that any adult would be able to know what type of action would cause him to be in violation of this statute. Therefore, we cannot conceive of any interpretation which would rule this statute unconstitutional because of vagueness.

The petitioners also allege that they were arrested because this was an interracial gathering. We believe the record to be clear as shown by the the testimony of Officer Jim Harris that the interracial gathering had no

bearing on the subsequent arrest. Officer Harris testified that there was an unusually large amount of traffic entering the project and that some of the cars which apparently contained minors had stopped at a liquor store before entering the project. He further testified that there had been an average of two or three shootings a week in the project and that this alone concerned him when the long string of automobiles containing people he knew did not live in the project began driving in. He stated on cross-examination that he would have taken the same action if all of the people had been of one race (T.35). It is easy to make allegations concerning race in a situation like this, and we are confident that there are many who would accept petitioners' allegations. To look strictly at the record, however, it is readily apparent that the interracial aspect of the party had nothing to do with the subsequent investigation and arrests by the officers because it was actually based on the minors and the liquor and the events of shootings during the past weeks and also the unusually large amount of traffic which entered the project.

The cases cited by the petitioners, like the contentions they are supposed to support, bear no relation to the facts of this case. There was no different treatment because of the different races of the participants in the party. The State did not use its official powers to coerce adherence to segregated customs, and the State did not interfere with petitioners' right to the privacy of their home and to associate with people of their own choosing.

CONCLUSION

On the basis of the foregoing argument and of the record in this case, respondent respectfully submits that certiorari should not be granted.

Respectfully submitted,

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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One of the reasons petitioners request the Court grant certiorari is to resolve a conflict in the lower courts over the question whether one who is not told that officers cannot make a search without a warrant should be held to waive the warrant requirement by acquiescing in a search. In its Brief in Opposition, the State of Arkansas urges the Court not to exercise its certiorari jurisdiction in this case because decisions of the lower courts are not in conflict over this question.

The Petition for Writ of Certiorari presents a number of appellate court decisions which are at odds, p. 17, note 10. The latest conflict has occurred subsequent to the filing of the Petition for Writ of Certiorari. In *United States* v. *Nikrasch*, 367 F.2d 740, 744 (7th Cir. 1966), the court of appeals held that an accused who had not been apprised of his Fourth Amendment rights could not consent to a search. In reaching this conclusion the court relied upon *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Judd* v. *United*

States, 89 App. D.C. 64, 190 F.2d 649, 651 (1951); and *United States* v. *Blalock*, 255 F.Supp. 268 (E.D. Pa. 1966).

On June 29, 1967 in *Gorman* v. *United States*, —— F.2d ——; 36 U.S.L. Week 2039, the First Circuit expressly refused to follow the holding of the Seventh Circuit in *Nikrasch*, that a suspect could not consent to a search if he was not advised of his rights under the Fourth Amendment.

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Certificate of Service

This is to certify that I have served true copies of the Petitioners' Reply to Brief in Opposition to Petition for Writ of Certiorari in the above styled case upon counsel for the State of Arkansas, by depositing same in the United States mail, air mail, postage prepaid, this 31st day of July 1967, addressed to the Honorable Joe Purcell, Attorney General, Justice Building, Little Rock, Arkansas.

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Attorney for Petitioners